Supreme Court, U.S.
FILED
JUL 7 2003
OFFICE OF THE CLERK

(7)

No. 02-1080

# IN THE SUPREME COURT OF THE UNITED STATES

GENERAL DYNAMICS LAND SYSTEMS, INC.,

*Petitioner,*

v.

DENNIS CLINE, *et al.*,

*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF NEITHER PARTY

LAURIE A. MCCANN*
DANIEL B. KOHRMAN
AARP FOUNDATION LITIGATION

MELVIN RADOWITZ
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060
Counsel for *Amicus Curiae* AARP

*Counsel of Record

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## BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF NEITHER PARTY

## INTEREST OF *AMICUS CURIAE*[1/]

AARP is a nonpartisan, nonprofit membership organization of 35 million people age 50 or older dedicated to addressing the needs and interests of older Americans.

One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. Through

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[1/] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* AARP states that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

its research, publications, and advocacy efforts, AARP seeks to eliminate ageist stereotypes and their arbitrary discriminatory effects, encourage employers to hire and to retain older workers, and help older workers overcome the obstacles they encounter because of age. AARP supports the rights of older workers and the public policies designed to protect those rights and strives to preserve the legal means to enforce them.

This case is of utmost importance to AARP's members. Approximately 45 percent of AARP's members remain active in the work force, most of whom are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 -633. The vigorous enforcement of the ADEA is of paramount importance for the millions of older workers who rely on the Act to deter and remedy invidious age bias in the work place. AARP opposes any judicial interpretation that would weaken the protections afforded by the ADEA, such as that by the court below prohibiting employer practices or policies that extend more favorable treatment to older members of the protected class.

AARP is also very troubled by the increasing trend amongst employers to reduce or terminate health coverage for retirees. The availability of health benefits is a critical factor in retirement decisions, especially among those who are not yet age 65. Since the likelihood of health problems and the cost of insurance increase with age, maintaining health coverage is essential to older individuals facing retirement. Health insurance plays a critical role in protecting financial stability in retirement. If one lacks adequate health coverage, one major health problem could wipe out an individual's retirement savings at a time in life when replacing lost savings is difficult, if not impossible.

For these reasons, AARP sympathizes with the plight of the Respondents who face uncertain financial security in retirement because of the Petitioner's decision to eliminate health care coverage for future retirees. At the same time, however, AARP does not believe that in enacting the ADEA Congress intended to prohibit employer practices or policies



that treat older workers in the statute's protected class more favorably than younger workers.

AARP strongly supports the ADEA and its coverage of all workers age 40 and over. However, the ADEA was enacted to protect this age group from being discriminated against as the grow older because of employers' preference for younger workers. A decision by this Court that the ADEA prohibits employers from proactively assisting older members of the protected group would undermine the effectiveness of the ADEA in eliminating arbitrary age discrimination and in promoting the employment of older workers.

For these reasons, AARP respectfully submits this brief *amicus curiae*.

## SUMMARY OF ARGUMENT

It is clear from the text, purpose, and the legislative history of the ADEA that Congress intended the Act to provide redress for older workers who are discriminated against in favor of younger workers. In contrast, there is not a scintilla of evidence that Congress intended the ADEA to provide a remedy for employees who claim they were discriminated because of their youth, regardless of their age.

Congress enacted the ADEA to address the plight of this nation's older workers who were, and are still, denied employment opportunities based on the fact that they are *older* than other candidates for the same opportunities. Older workers are let go in reductions-in-force because employers want "fresh blood"; they are turned away for jobs because they are "overqualified"; and they are denied training and promotional opportunities because "old dogs can't learn new tricks." The ADEA was designed to eliminate these serious problems faced by older workers, which become more severe and more prevalent with increasing age. Its effectiveness for doing so, however, will be significantly undermined if this Court rules that employers may not treat older workers in the protected class more favorably in recognition of the extensive age-related obstacles they face.

## ARGUMENT

### I. CONGRESS ENACTED THE ADEA TO PROHIBIT EMPLOYERS FROM DISCRIMINATING AGAINST OLDER WORKERS IN FAVOR OF YOUNGER WORKERS.

#### A. The Text of the ADEA Demonstrates Congress' Clear Intent To Protect Older Workers From Discrimination In Favor of Younger Workers

In enacting the ADEA, Congress sought to eliminate the widespread age discrimination that plagues individuals' efforts to find and to retain employment as they advance in age. It is evident from the plain language of the ADEA that Congress intended the Act to provide a remedy for individuals who are denied employment opportunities and benefits because they are too old - and not because they are too young. Indeed, the principal objective of the ADEA is to eliminate the discrimination against employees and applicants that emerges and that worsens as they age.

##### 1. The Findings and Purposes of the ADEA Document Congress' Focus on the Discrimination and Other Age-Related Obstacles Workers Face as They Grow Older.

The findings and purposes of the ADEA set out in 29 U.S.C. §§ 621 (a) and (b) are important parts of the statute and are not merely "hortatory," as characterized by the Sixth Circuit. *Cline v. General Dynamics Land Sys., Inc.*, 296 F.3d 466, 470 (6th Cir. 2002). These sections of the ADEA summarize the results of "the extensive factfinding undertaken by the Executive Branch and Congress," that culminated in the passage of the ADEA. *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). In clear terms, Section 621 sets out the problems and concerns that motivated Congress to enact the ADEA and to structure the law as it did. The ADEA was enacted because:



> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of *arbitrary age limits* regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, *relative to the younger ages, high among older workers*; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. § 621(a) (emphases added). Based on these findings, it is clear that the problems individuals face in obtaining and retaining employment as they grow older was the impetus for the enactment of the ADEA.

When Congress drafted the ADEA, it also included specific "purposes." The three stated purposes of the ADEA are: "to promote employment of older persons based upon their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). By specifically referring to the ADEA's purposes in two of the statute's affirmative defenses, Congress indicated that it intended the purposes to play a critical role in defining what is prohibited by § 4(a)(1), 29 U.S.C. § 623(a)(1).

Section 4(j)(2) of the ADEA states that it is not unlawful for a state or local government to refuse to hire or to discharge an individual as a firefighter or law enforcement officer "pursuant to a bona fide hiring or retirement plan *that is not a subterfuge to evade the purposes of [the ADEA]*." 29 U.S.C. § 623(j)(2) (emphasis added). Similarly, in enacting the Older Workers Benefit Protections Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990), Congress established a limited affirmative defense for voluntary early retirement incentive plans. Section 4(f)(2)(B)(ii) of the ADEA, as added by the OWBPA, states, "[i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide employee benefits plan that is a voluntary early retirement incentive plan *consistent with the relevant purpose or purposes of [the ADEA]*." 29 U.S.C. § 623(f)(2)(B)(ii) (emphasis added). In determining whether early retirement incentive plans violate § 4(a)(1) of the ADEA or satisfy the affirmative defense, courts have looked directly to the purposes of the ADEA set out in § 621(b).[2/]

Finally, the purposes of the ADEA are also directly implicated by another of the Act's affirmative defenses. Section 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i), provides a narrow defense to a claim that an employer provides lower benefits to older workers than younger workers. Because the cost of some benefits increase with age, the "equal benefit or equal cost" rule provides that an employer is required only to spend the same amount to provide the benefit for an older worker as for a younger worker. The "equal benefit or equal cost" rule was enacted to "harmoniz[e] two purposes of the ADEA in applying the Act to employee benefit plans: eradicating arbitrary discrimination based on age and promoting the hiring of older persons." H.R. Rep. No. 101-664, at 34 (1990).

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[2/] *See* S. 1511 Final Substitute Statement of Managers, 136 Cong. Rec. S13596 (daily ed. Sept. 24, 1990) ("As a general matter, the purpose implicated in considering an early retirement incentive plan or any particular feature of such a plan is the purpose of prohibiting arbitrary age discrimination in employment.").



Congress' focus on ameliorating the plight of workers as they grow older is manifest in the ADEA's findings and purposes. Actions by employers to help older members of the protected class overcome the obstacles they face are consistent with the purposes of the ADEA and should not be prohibited.

### 2. In Limiting the ADEA's Protected Class to Those 40 and Older, Congress Demonstrated Its Intent to Prohibit Discrimination Based on Advancing Age.

Section 12(a) of the ADEA provides additional textual evidence that Congress intended the ADEA to protect individuals from being discriminated against because they are perceived as too old. Section 12(a) expressly limits the ADEA's protections to "individuals who are at least 40 years of age." 29 U.S.C. § 631(a).

The Sixth Circuit took too simplistic a view of Congress' decision to include a minimum age provision in the ADEA concluding that § 631(a) merely "identified the older workers [Congress] intends to protect." 296 F.3d at 471. In so holding, the Sixth Circuit ignored other provisions of the ADEA which demonstrate that the Act does not provide a remedy for individuals who believe they were discriminated against because of their youth. In addition, when contrasted with other federal and state statutes which do prohibit age discrimination based both on youth and advancing age, the purpose and significance of the ADEA's minimum age provision is abundantly clear.[3/]

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[3/] When asked what lowering the minimum age to 21 would do to the proposed legislation that would become the ADEA, Secretary of Labor W. Willard Wirtz responded that it "would change the nature of the proposal from an over-age employment measure. . . ." *Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong. 47 (1967) (statement of Hon. W. Willard Wirtz, Secretary of Labor).

All 50 states and the District of Columbia have enacted laws that prohibit age discrimination in employment with 29 mirroring the ADEA in protecting individuals age 40 and older. The remaining state laws that prohibit age discrimination in employment either do not specify a minimum age requirement or set the minimum age at eighteen.[4/] Several of these laws have been interpreted to permit individuals to claim that they were discriminated against because of their youth. The state courts interpreting their state statutes as prohibiting discrimination based on youth as well as advancing age, have distinguished the language of their state statutes from that of the ADEA, which prohibits discrimination based solely on advancing age.

In concluding that the Michigan Civil Rights Act (CRA) prohibits discrimination against an individual perceived as being too young, the Michigan Court of Appeals relied on the fact that the statute prohibited discrimination based on age without limiting its reach to any particular age group. *Zanni v. Medaphis Physician Servs. Corp.*, 612 N.W. 2d 845 (Mich. Ct. App. 2000). The court contrasted the Michigan statute with the ADEA which "[u]nlike the [CRA], . . . limits the prohibitions against age discrimination 'to individuals who are at least 40 years of age.' 29 U.S.C. § 631(a)." 612 N.W. 2d at 847.

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4/ Alaska Stat. § 18.80.220(a)(1) (no age specified); Conn. Gen. Stat. § 46a-60(a)(1) (no age specified); D.C. Code Ann. § 2-1401.02(2) (eighteen or over); Fla. Stat. Ann. § 760.10(1)(a) (no age specified); Haw. Rev. Stat. § 368-1 (no age specified); Iowa Code § 216.6(3) (eighteen or over); Kan. Stat. Ann. § 44-1112(a) (eighteen or over); Me. Rev. Stat. Ann. tit. 5, § 4572 (no age specified); Md. Ann. Code art. 49B, § 16(a) (no age specified); Mich. Comp. Laws § 37.2103(a) ("chronological age"); Minn. Stat. § 363.01, Subd. 3 ("age of majority"); Miss. Code Ann. § 25-9-149 (no age specified); Mont. Code Ann. §§ 49-2-101(1) and 49-3-101(1) ("number of years since birth"); N.H. Rev. Stat. Ann. § 354-A:7(I) (no age specified); N.J. Stat. Ann. § 10:5-12(a) (no age specified); N.M. Stat. Ann. § 28-1-7 (no age specified); N.Y. Exec. Law § 296(3-a)(a) (eighteen or over); N. C. Gen. Stat. § 143-422.2 (no age specified); Or. Rev. Stat. § 659A.030(1)(a) (eighteen or over); Vt. Stat. Ann. tit. 21, § 495(a)(8)(c) (eighteen or over).



In *Maine Human Rights Comm'n v. Kennebec Water Power Co.*, the plaintiff claimed he was discriminated against based on his youth after applying for a position two times, once when he was 34 and once when he was 37, when in both instances the position was given to a 57-year-old man. 468 A.2d 307 (Me. 1983). In reversing a lower court's dismissal of the claim, after reviewing the text and the legislative history of the Maine statute,[5/] the Supreme Judicial Court of Maine emphasized that unlike the ADEA, which "specifically limit[s] its protection to a particular age group; [the Maine Human Rights Act] is age-neutral." *Id.* at 309.

In *Ogden v. Bureau of Labor*, 682 P.2d 802 (Or. Ct. App. 1984), a 30-year-old woman claimed she was denied employment as a beautician at a retirement home because she was too young. The defendant argued that the Oregon Fair Employment Practices Act, Or. Rev. Stat. 659.030(1)(a) (2001), "was intended to protect an employee possessed of age, not of youth." *Id.* at 807 However, according to the Court of Appeals of Oregon, "The plain message of the statute is otherwise." *Id.* In sharp contrast to the ADEA, which limits its protection to older individuals, the Oregon statute protects individuals age 18 and older from age discrimination. In choosing 18 as the minimum age for protection against age discrimination, the Oregon legislature, unlike Congress, clearly intended to address all forms of age discrimination and chose not to focus solely on the problem of older workers being denied employment opportunities because of increasing age. *Id.*

The Supreme Court of New Jersey ruled in *Bergen Commercial Bank v. Sisler*, 723 A.2d 944 (N.J. 1999), that a 25-year-old who was terminated from his vice-president position because of his employer's perception that he was too young for the job could invoke the anti-age-discrimination

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5/ During the debate in the Maine House of Representatives, one Representative commented, "I would like to remind all of us that what we are talking about here is the rights of individuals, the right of all Americans. We are hoping that everyone will look at this and let these Americans, whether they are 65, whether they are 41, 34, or whatever, to be evaluated on the job they are doing and that is all that we are saying." *Id.* at 309.

provisions of the New Jersey Law Against Discrimination (LAD), N.J. Stat. Ann. §§ 10:5-1 to - 42. Two sections of the LAD prohibit age discrimination. First, N.J. Stat. Ann. § 10:5-4 states:

> All persons shall have the opportunity to obtain employment . . . without discrimination because of . . . age . . . , subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

In addition, N.J. Stat. Ann. § 10:5-12(a) reads:

> It shall be an unlawful employment practice, . . . for an employer, because of the . . . age . . . of any individual . . . to refuse to hire or employ or to bar or to discharge or require to retire . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .

The New Jersey court looked to §§ 623(a) and 631(a) of the ADEA, the same sections the Sixth Circuit relied on below, and concluded that "the ADEA by its terms limits its protection to 'older' workers." 723 A.2d at 950. Based on the "significant language differences between the LAD and the ADEA," *id.* at 957, the court concluded that unlike the ADEA, the LAD protected individuals from being discriminated against whether it was because they were perceived as too young or whether they were believed to be too old. *Id.* at 957-58

Related federal anti-age-discrimination legislation further supports the conclusion that the ADEA does not protect against age bias directed at individuals because they are too young. The Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107, consistently and from the outset has been understood to "prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance,"



*id.*, § 6101, because injured individuals are too old *or* too young.[6/] The statute contains no minimum age eligibility provision. Further, in defining covered local governmental entities, it includes many that principally serve children, *i.e.*, any "local educational agency (as defined in § 9101 of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system." § 6107. Thus, "the ADA [of 1975] does not protect merely the elderly or persons who attain a particular age, but all persons at all times during their lives." Peter H. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 Yale L. J. 27, 29 (1979).

The legislative history of the 1975 ADA could not be more at odds with that of the ADEA with regard to the question of so-called "reverse discrimination." Reports that accompanied the final bill, statements of chief Congressional sponsors of the law, and views expressed to Congress by representatives of the Executive Branch, all expressly addressed the legislation assuming it applied both to age-based discrimination against the elderly and comparable bias disadvantaging children or other younger persons. *See Rannels v. Hargrove*, 731 F. Supp. 1214, 1220-21 (E.D. Pa. 1990) (summarizing legislative record of ADA of 1975); *accord* Schuck, *supra*, 89 Yale L.J. at 29-30, nn. 13-14 (same).

### 3. The ADEA's "Equal Benefit Or Equal Cost" Rule Provides Strong Textual Evidence of Congress' Intent to Protect Older Workers from Discrimination in Favor of Younger Workers.

Any doubt that Congress intended the ADEA to protect individuals against discrimination because they are older, not

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6/ "Its provisions are broad and it is the intent of the committee that it apply to age discrimination at all age levels, from the youngest to the oldest." 121 Cong. Rec. 9212 (Apr. 8, 1975) (statement of Rep. Brademas).

younger, disappears upon consideration of the Act's "equal benefit or equal cost" rule, which states:

> It shall not be unlawful. . . (B) to observe the terms of a *bona fide* employee benefit plan –
>
> (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker.

29 U.S.C. § 623(f)(2)(B)(i). Significantly, this section commands that the amount spent on older workers may be no less than that spent on younger workers, but it does not prohibit an employer from spending more on older workers. Nor does it state that the cost incurred on behalf of an older worker must be no less than that incurred on behalf of a younger worker outside the protected class. "The language . . . requiring that the 'payment made or cost incurred on behalf of an older worker is not less than that made or incurred on behalf of a younger worker' is designed to provide employers with the flexibility of incurring *greater* costs for benefits on behalf of older workers in appropriate circumstances." S. Rep. No. 101-263, at 18 (1990); H.R. Rep. 101-664, at 34 (1990) (emphasis in original).

Senator Javits, one of the earliest and most influential advocates of the initial ADEA, explained on the floor of the Senate in words later heralded as authoritative, *see* S. Rep. No. 101-263, at 6-7 (1990) (citing 113 Cong. Rec. 31254-55) (Nov. 6, 1967):

> [Under Section 4(f)(2) of the Act], an employer will not be compelled to afford older workers exactly the same pension, retirement or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers.



Most significant, for purposes of this case, is the fact that neither Senator Javits nor any other member of Congress perceived a need for legislation to protect younger workers against discrimination on grounds of greater benefit expenditures favoring older workers, in the absence of an "equal benefit or equal cost" rule. Rather, Congress enacted the "equal benefit or equal cost" rule so that employers would not be discouraged from hiring older workers in the protected class on account of the increasing cost of benefits as those workers age. It follows that Congress also never contemplated that the ADEA's language could be turned on its head to prohibit employers from incurring greater costs to provide benefits for older workers in the protected class.

### B. The ADEA's Legislative History Contains Overwhelming Evidence That In Enacting the ADEA Congress Was Seeking to Address the Age-Related Problems Workers Face as They Grow Older.

The legislative history of the ADEA confirms what the text plainly establishes – the purpose of the ADEA is to provide a means of redress for the discrimination individuals face as they grow older. The Sixth Circuit refused to consider the ADEA's legislative history after concluding that the statute's "plain language" supported the Respondents' claim. 296 F.3d at 469. However, as described above, the ADEA's "plain language" demonstrates that the Act was designed to address the employment problems that workers encounter as they age, particularly their difficulties in competing with younger individuals for the same employment opportunities. Moreover, as the Court has recognized, "Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since, the plain- meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 455 (1989), quoting *Boston Sand & Gravel Co. v. Untied States*, 278 U.S. 41, 48 (1928).

While the legislative history of the ADEA is replete with references to Congress' concern that individuals were being discriminated against because employers believed they were too *old*, not a single reference can be found suggesting that Congress worried that individuals age 40 and over might suffer discrimination because of their youth. In short, that individuals age 40 and over might be denied employment opportunities or benefits because they were too young was not even on Congress' radar screen.

In construing the ADEA and the concerns underlying "Congress's promulgation of the [Act]," this Court repeatedly has drawn on the text of a 1965 report prepared by U.S. Secretary of Labor W. Willard Wirtz. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993); *Western Airlines, Inc., v. Criswell*, 472 U.S. 400, 411, 422 (1985); *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). The "Wirtz Report"[7] satisfied Congress' charge "to make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and the individuals affected." Section 715 of the 1964 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964). In his letter of transmittal to Congress, Secretary Wirtz explained that the Report, "presents recommendation for dealing with arbitrary discrimination in employment because of age and with the basic factors which impede the reemployment of displaced workers *as they grow older*." Report at ii; 1967 Leg. Hist. at 17 (emphasis added).

The Report confronted "the problem of discrimination in employment based on aging." Report at 1; 1967 Leg. Hist. at 19. Thus, the authors addressed workplace discrimination "problems associated with advancing years," *id.*, such as "whether or not a prospective employee is [considered] too old

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[7] U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964* (1965) ("Report"); *reprinted in* U.S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act, at 16-41 (1967) ("1967 Leg. Hist.").



to be taken on." *Id.* at 2; 1967 Leg. Hist. at 20. The Report's unambiguous (and in spots highly dramatic) focus was the possible unfairness and thus, devastating impact for a worker of an employer concluding "'You're too old.'" *Id.* at 1; 1967 Leg. Hist. at 19.[8] This record is completely inconsistent with the Sixth Circuit's assessment that Congress in the ADEA outlawed all age discrimination against workers age 40 and older, whether because they are too old *or* too young.

The Report discussed three very different challenges facing older workers in 1965: "arbitrary discrimination," consisting most egregiously - but not exclusively - of explicit age-limits on employer hiring;[9] "forces of circumstance" that limit older worker opportunities; and "institutional arrangements that indirectly restrict the employment of older workers." The Wirtz Report declared the need for a civil rights law to address only the first of these. Yet the Report concluded that all three restrict job opportunities to a degree that grows with the advancing age of workers. By contrast, the Wirtz Report never once identified or articulated a pattern of disadvantage for workers in middle age because employers, or societal forces, or "institutional arrangements" deem them to be too

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[8] "There is ... no harsher verdict in most men's lives than someone else's judgment that they are no longer worth their keep. It is then, when the answer at the hiring gate is that 'You're too old,' that a man turns away, in another poet's phrase, 'nothing to look backward to with pride, nothing to look forward to with hope.' If that verdict is fair on the facts, it can only be viewed as part of life's bruising mystery. But if that verdict is unfair, or unnecessary, it is part of man's inhumanity to man that can and must be stopped." *Id.* at 1; 1967 Leg. Hist. at 19.

[9] The Report noted that in "individual circumstances" arbitrary age bias infects "decisions made about aging and the ability to perform," as well as "institutional arrangements" that "operate indirectly to restrict the employment of older workers." *Id.* at 5; 1967 Leg. Hist. at 22. The Report also questioned employer practices with disparate impacts adverse to skilled older workers, such as tests on which results are "affected by recency of education and testing experience,"and which thus may not accurately measure worker productivity. *Id.* at 14; 1967 Leg. Hist at 14.

young. Hence, the Report contains no support for legal measures to prohibit employer preferences for, or other forces favoring workers in their fifties and sixties over workers in their forties.

The most serious problem of "arbitrary discrimination" outlined in the Wirtz Report was explicit maximum-age hiring limits. These were found "in announced employer policies (*e.g.*, in Help Wanted advertisements; or in job orders filed with employment agencies) or in dealings with [job] applicants." To assess the effect of age limits, the Labor Department surveyed 500 employers in five major cities in states without age bias laws. Only twenty states banned such limits. Of the surveyed employers, "[a]lmost three in five" enforced restrictions in the case of new hires, "most frequently between [ages] 45 and 55." Report at 6-7; 1967 Leg. Hist. at 23-24. Only "[a] very small proportion"of new hires were above 45 years of age, with the problem growing significantly worse for each of three age cohorts: 45-54; 55-64; and 65 and above.

The Report also concluded that "a great many" age limits were "based in fact on considerations quite different" than those stated by employers: these rationales were often pretextual or founded on rank and inaccurate stereotypes about the supposed inadequacies of older workers. In rebuttal, the Report discussed empirical evidence on "aging and human skill" indicating "increasing differences of individual performance with advance in age," as well as "an increasing capacity of the human system to compensate for diminishing abilities, and a wide range of occupational requirements which fall well below the usual range of personal capacities subject to these requirements." *Id.* at 7-8; 1967 Leg. Hist. at 24-25.

By contrast with this systematic exploration of the basis for banning discrimination because workers are too old, the Wirtz Report contains no discussion whatsoever of "arbitrary" age discrimination against workers over age 40 or 45 in favor of still older workers. Similarly, the Report focused on factors unrelated to bias which suppress employment of skilled older workers, yet does not consider comparable factors restricting



opportunities for forty-year-olds while favoring fifty- and sixty-year-olds. The chief culprits identified as limiting work for older individuals - other than arbitrary bias - are described as bearing more heavily on workers as they grow older. These include the growing "pace of technological change," "continually rising levels of education," and "increases in the range of individual [health] differences among workers as age advances." Report at 11-14; 1967 Leg. Hist. at 28-31.[10/]

In its account of institutional arrangements affecting older workers, the Report stressed - as it did in earlier sections - the issue of hiring opportunities, to the exclusion of other possible perspectives on age-based employment discrimination, such as equity in benefits, or other terms and conditions of employment. This priority was consistent with the Report's preoccupation with potential disadvantages associated with advancing age, and thereby diverged from attention that hypothetically might have been devoted to age-based disadvantage for younger segment of the ADEA's protected class. Thus, the Report discussed seniority systems not as disproportionally advantaging the oldest workers, but as resulting in possible inequities among the oldest workers. Report at 15; 1967 Leg. Hist. at 32. Similarly, the Report's discussion of worker benefits identified various factors that might deter hiring employees near retirement. *Id.* ("costs of a typical health and insurance package for a company with a hiring policy that concentrates on younger workers may prove to be less"). However, the Wirtz Report did not express any interest in correcting possible inequities presented by benefit structures which might disadvantage younger older workers in dollar terms - as alleged in this case - rather than in regard to employability. *Id.* at 16, 17; 1967 Leg. Hist. at 33, 34 ("where

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10/ Likewise, the Report discussed "the development of 'special early retirement' incentive programs," without noting that these generally disfavor the younger portion of workers aged 40 and over. Rather, the Report focused on problems faced by individuals as they grow older, noting that such incentives increase bias against the older portion of the protected class, by "push[ing] downward the age at which employers are willing to employ older workers for new jobs and vacancies." *Id.* at 14; 1967 Leg. Hist. at 31.

benefit formulas are based largely on highest earnings or earnings during the last few years of service, the ultimate pension costs could be greater for newly hired young employees"; "[v]esting would also narrow the present cost [i.e., hiring] advantage that favors younger workers [and benefit inequity that disfavors them] which arises partly because younger workers, without vesting and with greater turnover, often forfeit their pension right").

The legislative record from 1967, including House and Senate Reports on bills essentially the same as the ultimate text of the ADEA, overwhelmingly reflects the concerns and priorities set out in the Wirtz Report. Thus, the record contains nothing to suggest Congress intended to permit claims such as those of Respondent, by workers over age 40 on grounds they were disadvantaged by employers because they were too young. By contrast, the record contains strong signs that Congress intended the ADEA to permit only claims by covered employees who allege that they were injured on account of being too old.

The only major issue concerning treatment of younger workers in the early history of the ADEA concerned proposals to extend the lower limit of employee eligibility to permit suits by stewardesses discharged in their thirties based on rigid age limits, in some cases as low as 32, *because they were too old. See, e.g.*, S. Rep. No. 90-723, at 6-7 (1967); 1967 Leg. Hist. at 110-111; H. R. Rep. No. 90-805, at 6-7 (1967); 1967 Leg. Hist. at 79-80.[11/] Both reports stated the reason for leaving the minimum eligibility age at 40 is a belief that lowering the age limit "would lessen the [bill's] primary objective; that is, the promotion of employment opportunities of older workers." *Id.*

A primary thrust of the 1978 and 1986 Amendments to the ADEA was a loosening, and then elimination of upper age limits on workers' eligibility to assert age discrimination

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[11/] *See also* H.R. Rep. No. 90-805, *supra*, at 14; 1967 Leg. Hist. at 87 (Supplemental Views of Representatives Thompson, *et al.*) (stewardesses discharged at age 32 because they were considered "too old").



claims. *See* Pub. L. No. 95-256, 92 Stat. 191 (1978) (eliminating maximum age limit on eligibility to assert ADEA claims for most federal workers, and expanding from age 65 to age 70 maximum age limit on eligibility of most other workers); Pub. L. No. 99-592, 100 Stat. 3342 (1986) (eliminating maximum age limit on eligibility of most non-federal workers to assert ADEA claims).

In each instance, Congress discussed in great detail the opportunities for newly eligible workers to combat age discrimination. However, nowhere did Congress address the possibility of claims of "reverse discrimination" on account of age by or against newly eligible workers. Once again, this legislative silence is utterly inconsistent with claims asserted by respondent.

## II. THE ADEA DOES NOT PROHIBIT EMPLOYERS FROM ESTABLISHING MINIMUM AGE REQUIREMENTS FOR BENEFITS OR FROM TREATING OLDER MEMBERS OF THE PROTECTED GROUP MORE FAVORABLY.

There is no evidence in either the text or the legislative history of the ADEA that Congress intended the Act to prohibit an employer from setting a minimum age requirement for employee benefits or from treating older members of the protected group more favorably. Many benefits are structured in this fashion, the most common being early retirement incentive plans. However, while the courts[12/] and Congress[13/]

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[12/] *See, e.g., Karlen v. City Colleges of Chicago*, 837 F.2d 314, 320 (7th Cir.), *cert. denied*, 486 U.S. 1044 (1988); *Solon v. Gary Comty. Sch. Corp.*, 180 F.3d 844, 852-53 (7th Cir. 1999); *O'Brien v. Board of Educ. of the Deer Park Union Free Sch. Dist.*, 127 F. Supp. 2d 342 (E.D.N.Y. 2001).

[13/] S. 1511 Final Substitute Statement of Managers, 136 Cong. Rec. S13596 (daily ed. Sept. 24, 1990) ("Early retirement incentive plans that withhold benefits to older workers above a specific age while continuing to make them available to younger workers may conflict with the purpose of prohibiting arbitrary age discrimination in employment.").

have consistently condemned early retirement incentive plans that deny benefits to workers above a certain age, it has been undisputed that employers may establish a minimum age for eligibility for such benefits.[14/]

In addition to permitting an employer to establish a minimum eligibility age for benefits, the ADEA also allows employers to extend more favorable treatment to older members of the protected class. As explained in the employee benefits chapter of the EEOC's Compliance Manual, "The Commission's ADEA regulations permit employers to provide *additional benefits to older workers* where the employer has a reasonable basis to conclude that the benefits will counteract problems related to age discrimination." EEOC Compliance Manual § 3 Employee Benefits (2000) (emphasis in original). The referenced regulation states:

> The extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination.

29 C.F.R. § 1625.2(b) In response to comments suggesting that this regulation was ambiguous, the EEOC clarified its intent and meaning in detail:

> The proposed interpretation was never intended to sanction discrimination between individuals entitled to the protections of the act. Rather the section was intended to permit an employer to extend additional benefits to older members of

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14/ *See, e.g., Solon*, 180 F.3d at 851 (explaining that the plan in *Henn [v. National Geographic Society*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987)] was lawful because "Beyond the minimum-age-requirement-something that the ADEA sanctions, *see* 29 U.S.C. § 623(l)(1)(a) - the terms of the plan incorporated no age-based assumptions as to when retirement is 'early' and when it is not; a 75 year old could retire on the same terms as a 55 year old.").



> the protected group in recognition of problems peculiar to those older individuals. The Commission intends that the final interpretation contained in paragraph (b) of this section provide for a continuation of the flexible approach first announced in administrative Opinion Letters of the Department of Labor. Opinion Letter 404 of the Wage-Hour Administrator of the Department of Labor (August 26, 1976) advises that it is permissible to insert contract language which would require that a certain number of positions be made available to an older segment of the protected group. Similarly, Opinion Letter 451 of the Wage-Hour Administrator (January 31, 1978) permits varying amounts of severance pay based, in part, on an employee's age. The basis for both opinion letters was that an employer can take measures to counteract discrimination which is more prevalent against older members of the protected group. The former letter, 404, recognized that an older employee (55 and over) may be a more frequent target of age discrimination, and the latter opinion, 451, recognized that same principle in the context of job relocation. In both instances, the opinions were based on tacit recognition of the fact that age discrimination is frequently more prevalent and more severe against older workers in the protected age group.

Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47724 (Sept. 21,1981) (footnote omitted).

In its Compliance Manual, the EEOC provides the following example of an employer lawfully providing greater benefits to older workers in the protected class:

> Employer Y terminates 30 employees in a reduction-in-force. Eight of the laid-off workers are between 40 and 50 years old, and two

> are 55 years old. Y gives a severance benefit of $1,000 to each of the employees who are 50 or under, and provides a $2,000 severance benefit to each of the 55 year olds. When challenged, Y states that it gave the older workers a higher benefit based on a government study stating that unskilled workers over the age of 50 have a much harder time regaining employment after a lay-off than their younger counterparts. Employer Y has acted to address problems older workers have in obtaining employment and has not violated the ADEA.

EEOC Compliance Manual § 3.[15] Immediately following this example of how providing "better benefits to older workers" does not violate the ADEA, the EEOC concludes by emphasizing that, "*If benefits are lower for older workers, a violation will be found* unless the unequal benefits can be justified." *Id.* (emphasis in original).

As individuals grow older, age discrimination looms as a more significant barrier to securing and retaining employment. The ADEA and the EEOC regulations interpreting the Act permit employers to extend more favorable treatment to older members of the protected class to compensate for the increased obstacles they encounter.

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[15] While the EEOC's interpretive guidelines do not receive deference under the Court's decision in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *see EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991), such interpretations are "'entitled to respect' under the Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See also Clackamas Gastroenterology Assoc. v. Wells*, 123 S. Ct. 1673, 1680 (2003).



## III. ALLOWING INDIVIDUALS TO BRING CLAIMS UNDER THE ADEA THAT THEY WERE DISCRIMINATED AGAINST BECAUSE OF THEIR YOUTH WILL UNDERMINE THE VERY SPIRIT AND PURPOSE OF THE ACT.

Allowing claims for discrimination based on youth belittles the plight of older workers and will undermine the effectiveness of the ADEA in eliminating the serious problems that still plague older workers in their efforts to obtain and to retain employment in a youth-oriented society.

The ADEA was enacted because of our society's enchantment with youth. In the words of Senator Yarborough, one of the ADEA's sponsors:

> The accent on youth - almost a cult in this nation - understandable as it is in such a fast-moving era has nonetheless given rise to the wholly fallacious, yet widely held belief, that older persons are unqualified, or less qualified to perform many tasks in this technological age.

*Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong. 23 (1967) (statement of Sen. Jacob K. Javits).[16] This is what older workers faced when the ADEA was enacted over 35 years ago and, unfortunately, it has not changed.[17] There is still an unfounded and unfair premium on youth in our society and, accordingly it is imperative that the

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[16] "This present age has been called on (sic) age where the cult of youth seems to prevail over everything else." *Id.* at 28.

[17] "The pervasive belief that all abilities decline with age has fostered the myth that older workers are less efficient than younger workers. Since younger workers, rather than older workers, tend to receive the skills and training needed to keep up with technological changes, the myth continues." Senate Special Comm. On Aging, Developments in Aging: 1996, S. Rep. No. 105-36, at 7 (1996).

Court confirm that the purpose of the ADEA is to protect individuals as they grow older from being arbitrarily judged based on their age and not their ability. It is also critical that the Court reaffirm that the ADEA does not prohibit employers from extending more favorable treatment to older members of the ADEA's protected class in recognition of the detrimental effects of our society's inclination to place a premium on youth.

## CONCLUSION

For the foregoing reasons, AARP requests that the Court reverse the judgment of the Sixth Circuit.

July 7, 2003

Respectfully submitted,

Laurie A. McCann*
Daniel B. Kohrman
AARP Foundation Litigation

Melvin Radowitz
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060
Counsel for *Amicus Curiae*
AARP

*Counsel of Record